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Higgs v Monro Limited [2015] NZEmpC 202 (17 November 2015)

Last Updated: 27 November 2015

IN THE EMPLOYMENT COURT CHRISTCHURCH

[\[2015\] NZEmpC 202](#)

EMPC 200/2015

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN JAMES HIGGS Plaintiff

AND MONRO LIMITED Defendant

Hearing: 21-22 October 2015 (heard at Christchurch)

Appearances: R Thompson and M McDonald, advocates for the plaintiff

T Mackenzie and N McSparron, counsel for the defendant

Judgment: 17 November 2015

JUDGMENT OF JUDGE B A CORKILL

Background

[1] Each party has brought a non de novo challenge to aspects of a determination of the Employment Relations Authority (the Authority) dated 25 June 2015.¹ Since the determination is at the heart of the resolution of such a challenge, it is necessary to summarise it in detail.

[2] The Authority recorded that Mr James Higgs was employed as a truck driver for Monro Limited (Monro). Peter Monro is the sole Director of the company which commenced its relevant operations in 2008 with his two sons, Richard Monro and Philip Monro; at a later stage they were joined by a third son, Matthew Monro. Monro has 11 employees and six trucks, and carries on business in trucking,

excavator hire and logging.

¹ *Higgs v Monro Ltd* [2015] NZERA Christchurch 85.

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[3] Mr Higgs raised a relationship problem following an incident that occurred on 16 July 2014. He asserted that he was unjustifiably disadvantaged when he was suspended without consultation on 24 July 2014 and that after a disciplinary process he was unjustifiably dismissed on 29 July 2014.

[4] Giving rise to these issues was an altercation between Mr Higgs and Philip Monro. Mr Higgs had been required to drive a truck to Lyttelton Port to deliver some logs, where the fuel tank of the vehicle driven by Mr Higgs was damaged by a third party. This was not noticed until Mr Higgs returned the vehicle to Monro's base. The Authority found that all parties were annoyed about the damage that had occurred; it also noted that Peter Monro did not blame Mr Higgs for what had occurred.

[5] After Peter Monro had inspected the damage, he left Philip Monro and Mr Higgs to finish loading the truck, so that he did not see what was to follow. Soon after, Philip Monro opened the tailgate and threw a crowbar and some heavy chains into a

cage on the rear of the vehicle. This made a lot of noise, to which Mr Higgs reacted. The incident culminated in physical contact about which there was a conflict of evidence. Mr Higgs stated that he “shoulder bumped” Philip Monro as he walked past him to drive the truck out of the yard. Mr Higgs subsequently acknowledged that he had become angry, explaining that he had been subject to bullying by Philip Monro. Later he gave a voluntary apology. A disciplinary process followed; this resulted in Peter Monro ultimately deciding to terminate Mr Higgs’ employment.

[6] The Authority determined, first, that a fair and reasonable employer could conduct a disciplinary process with a disciplinary outcome notwithstanding the tendering of a voluntary apology by Mr Higgs to Philip Monro. This conclusion was not challenged.

[7] Next, the Authority considered that a reasonable employer could conclude that Mr Higgs had connected his shoulder with Philip Monro “in more than a

technical way and did so deliberately” and that this was an assault. This could be regarded as serious misconduct.² This conclusion was not challenged.

[8] Then the Authority considered whether Mr Higgs was unjustifiably suspended, as had been contended. The Authority determined that a request that Mr Higgs not attend work related to whether, even if there was an unjustified suspension, “there was no evidence of disadvantage that would result in a compensatory remedy.”³ This conclusion was not challenged.

[9] The main liability issues which were considered by the Authority related to issues of procedural fairness during Monro’s investigation. Because this was at the heart of a cross-challenge brought by the defendant, it will be necessary to consider the Authority’s reasoning in more detail later.

[10] The Authority determined that Monro had failed to comply with minimum procedural fairness requirements as required under [s 103A\(3\)](#) of the [Employment Relations Act 2000](#) (the Act), and the employer’s good faith obligations. These procedural failings were not minor. The Authority could not conclude that the context of the assault was properly and fairly investigated. Mr Higgs did not have a fair opportunity to explain the circumstances which would have amounted to mitigation factors which needed to be taken into account. The Authority concluded: “[c]onsequently, the decision to dismiss on the basis of an inadequate investigation was not one that a fair and reasonable employer could have made in all the

circumstances.”⁴

[11] Lost wages were sought and awarded. The amount which was payable for the three weeks following dismissal was \$2,399.55 gross, before any allowance for contribution. Counsel were to confer as to the correct amount which was payable for the balance of the three-month period which followed the dismissal, as there was an issue as to the appropriate weekly wage. Leave was reserved for the parties to return

to the Authority, if necessary.⁵ This conclusion was not challenged.

² At [64], [82] and [83].

³ At [68].

⁴ At [84].

⁵ At [89].

[12] Turning to compensation for humiliation, loss of dignity and injury to feelings, the Authority accepted that Mr Higgs suffered some financial difficulties following dismissal, that he felt embarrassed by the termination and the fact that the dismissal had been unfair. The sum of \$4,000 was awarded, subject to contribution. This conclusion is the subject of the non de novo challenge brought by Mr Higgs.

[13] In reviewing contribution, the Authority found that a conclusion needed to be reached on the balance of probabilities as to what had happened in the altercation. After reviewing the evidence, the Authority found that Mr Higgs had assaulted Philip Monro and “not simply in a technical manner”. The assault was an angry reaction, and one which was quite inappropriate in the workplace. Contribution was fixed at 50 per cent. This too is the subject of the challenge by Mr Higgs.

Issues before the Court

[14] The first pleading to be filed was Mr Higgs’ statement of claim raising a non de novo challenge in respect of remedies. This was followed by Monro’s statement of defence including a non de novo cross-challenge as to the findings made in respect of procedural unfairness. In this decision it will be appropriate to deal with the latter first, since liability issues should precede those relating to remedies.

[15] I recently reviewed the applicable principles with regard to non de novo challenges in *Lim v Meadow Mushrooms Limited*

in these terms:6

[23] ...

(a) [Section 179\(4\)](#) of the Act provides that if a party making an election is not seeking a hearing de novo, the election must specify:

- the determination, or part of the determination, to which the election relates;
- any error of law or fact alleged by that party;
- any question of law or fact to be resolved; the grounds on which the election is made is to be sufficiently particularised so as to give full advice to both the Court and the other party of the issues involved; and

6 *Lim v Meadow Mushrooms Ltd* [2005] NZEmpC 192, (footnotes omitted).

- the relief sought.

(b) A non de novo hearing is accordingly in the nature of an appeal and the challenger/plaintiff is required to show that the Authority's determination was wrong.

(c) Thus, the challenger has an onus of persuading the Court of the existence of an error of fact and/or law by the Authority in its determination.

(d) Making such an election does not dictate the way in which the appeal is to be heard. There may be evidence or further evidence about the matters at issue in the non de novo challenge. It may become necessary for the Court to make its own decision, as required by [s 183](#) of the Act.

(e) To succeed on a non de novo challenge, a plaintiff must establish one or more of the alleged errors which the challenger has pleaded. If the Court is satisfied that the Authority has made one or more of the errors, so that it is necessary to set aside some or all of the Authority's determination, then it may reconsider the issue involved taking into account any evidence called at the hearing of the challenge.

[16] *Monro* alleges that the Authority was wrong in law on each of the following conclusions as to procedural issues:

- a. That Peter *Monro* was biased, which resulted in unfairness in the decision-making.
- b) That the complaint was not fully and fairly put to Mr *Higgs*.
- c. That Matthew *Monro* should have been interviewed by Peter *Monro* as part of the disciplinary process.

[17] In his pleadings, Mr *Higgs* challenges the finding made under [s 123\(1\)\(c\)\(i\)](#)

of the Act, and as to contribution under [s 124](#) of the Act, in these respects:

- a. That the Authority failed to consider Mr *Higgs*' state of mind at the time of the incident.
- b) That the Authority failed to fully consider the impact and effects of the dismissal beyond financial impact; specifically, distress that was caused by the termination was not considered.
- c) That the assessment of contribution at 50 per cent was excessive.

[18] The Court is accordingly required to consider whether the Authority made any one or more of the alleged errors. If it has and it is therefore necessary to set aside some or all of the Authority's determination, then the particular issues involved should be reconsidered by this Court. That reconsideration will require a consideration of the evidence which was received at the hearing of the challenge.

Issue one: did the Authority err as to its findings concerning procedural unfairness?

[19] The first issue raised for *Monro* relates to the finding of bias. The key

aspects of the Authority's conclusions were:

a) Peter Monro accepted under questioning as sole decision-maker that it was probably fair he felt influenced by others in his decision-making.

b) There was no one else from within the company to undertake the process but the nature of the allegation – assault of his son – made this difficult.

c) Accordingly, it was difficult for Peter Monro to objectively consider the matter with an open mind; this could have led to some unfairness in the decision-making.

d) The Authority said that this conclusion was strengthened by its findings as to a “lack of sufficient investigation to put the assault in context.”⁷

[20] Before determining whether the Authority erred when making its findings as to bias, it is necessary to record the findings relating to investigative flaws, since

these conclusions were relied on as an aspect of the bias finding, and are also now

7 Higgs v Munro Ltd above n 1, at [71].

challenged by Monro. The Authority’s findings focused on Monro’s investigation meeting, and were as follows:

a) Mr Higgs had said he bumped Philip Monro with his shoulder.

However, the allegation for the purposes of the disciplinary investigation was that there was a “shoulder charge to the chest”. The notes of the investigation meeting did not record Mr Higgs’ account at all. The Authority found that Peter Monro concluded the allegation of a shoulder charge was simply admitted.

b) It would have been appropriate for Peter Monro to interview Philip Monro formally, or to ask him to write down his recollection as to what had occurred; such information could have been provided to Mr Higgs before the disciplinary meeting, and Mr Higgs’ response could then have been recorded. Since this did not occur, the Authority could not be satisfied the complaint was fully and fairly put to Mr Higgs.

c) Mr Higgs had told the Authority that there was a heated discussion just before the altercation. In his evidence, Philip Monro denied anything was said before he was assaulted. The Authority found that an employer approaching the matter with an open mind would have wanted to know what had preceded the assault, and whether anything was said. Good faith obligations require the provision of information to the employee and an opportunity to comment on it before an adverse decision as to continuation of employment is made.

d) Another issue in dispute related to the degree of force used.

Philip Monro said that the charge left a bruise on his chest which he showed to his mother who is a General Practitioner two days after the incident and some days prior to the disciplinary meeting. She noted a hollow in the sternum which felt “squishy” and that there was a “yellowing bruise”. This factor was known to Peter Monro and was persuasive as to the degree of force, but it was never put to Mr Higgs. The location of the bruise would seem inconsistent with a “shoulder

bump”. The Authority found that the issue may not have been

explained or discussed at the disciplinary meeting.

e) Matthew Monro could also have been expected to be interviewed.

Mr Higgs telephoned him soon after the altercation and also saw him when he delivered the gear he transported in his truck after leaving Monro’s yard. It was at that point he gave the explanation that he had “dropped shoulder and ran right through him”. There was a dispute as to whether these words were used.

f) The email written by Peter Monro on 29 July 2014 confirming the dismissal stated that Mr Higgs had assaulted Philip Monro and that it was “relatively serious and intentional, hostile and could have injured him”. The Authority found that this indicated Peter Monro had determined that the impact was more serious than a shoulder bump. Due to the lack of detail in the notes of the disciplinary meeting, it was unclear whether this assault was admitted; nor whether the circumstances surrounding it were considered.

g) The Authority found that Mr Higgs raised some matters at the disciplinary meeting by way of explanation that a fair and reasonable employer could have been expected to discuss again with Philip Monro as part of a full and fair investigation so as to put the assault in context. Particular reference was made to the issue of whether a crowbar had been thrown with more force than usual because he was angry, and whether Mr Higgs could have thought that it was thrown in his direction. There was also a finding that Peter Monro unfairly placed some reliance on the earlier meeting about Mr Higgs’ anger, without

discussing it at the investigation meeting.

[21] I shall now consider the points raised by Mr Mackenzie when advancing the cross-challenge for Monro.

[22] The first relates to the Authority's findings that it could not be satisfied the complaint was fully and fairly put to Mr Higgs, and that information should have been provided to him before the disciplinary meeting. It was submitted that such a conclusion does not reconcile either with orthodox natural justice principles nor the requirement of [s 4\(1A\)\(c\)](#) of the Act which in summary imposes a duty to provide information to an employee which is relevant to the continuation of his or her employment. Counsel argued that a letter sent by Peter Monro to Mr Higgs prior to the investigation meeting put him sufficiently on notice as to the issue which needed to be discussed.

[23] That letter stated:

[I]t is alleged that on Wednesday, 16 July 2014 after you returned to the yard at about 3 pm you assaulted Phil Monro. There had been a discussion regarding the damage to the fuel tank on the log truck which I was part of. After I left the truck, it is alleged that you shoulder charged Phil in the chest. You then left the yard in our Dyna swearing and cursing.

Later that evening, in a text message to me, you said "I guess I mistook his anger for the situation as anger towards me and being upset about it caused a problem".

[24] The difficulty with the letter was that it made only a rudimentary reference to the account given by Philip Monro; it did not refer to any contextual matters that may have preceded the alleged assault such as any relevant exchanges between Mr Higgs and Philip Monro; or the throwing of items onto the tray of the truck; and it did not refer to the post-incident bruising which was obviously of potential relevance.

[25] Mr Mackenzie referred to [s 4](#) of the Act which describes the obligation of parties to deal with each other in good faith, and in particular [s 4\(1A\)](#) of the Act which relevantly states:

(1A) The duty of good faith in sub-section (1)–

- a. is wider in scope than the implied mutual obligations of trust and confidence; and
- b. requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and
- c. without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected–
 - i. access to information, relevant to the continuation of the employees' employment, about the decision; and
 - ii. an opportunity to comment on the information to their employer before the decision is made.

[26] Mr Mackenzie also relied on orthodox principles as to natural justice, particularly those which relate to the disclosure of all relevant evidential material, whether that material becomes available before, during, or after a hearing.⁸

[27] In *Vice-Chancellor of Massey University v Wrigley* a full Court accepted that [s 4\(1A\)\(c\)](#) is a "natural justice provision".⁹ Since it is a specific provision relating to employment relationships, it is appropriate for the purposes of this case to focus on its terms. The full Court discussed the requirements of the subsection in these terms:

[55] The purpose of [s 4\(1A\)\(c\)](#) is to be found in para (ii) which requires the employer to give the employees an opportunity to comment before the decision is made. That opportunity must be real and not limited by the extent of the information made available by the employer.

...

[61] Where the information concerned is not contained in a document, access to that information may reasonably be provided in other ways, such as telling the employee orally what the information is. In each case, the appropriate means of providing access to relevant information will depend on the nature of the information, the volume of it and the circumstances of both the employer and the employee. What will be acceptable and consistent with the statute as a means of access which enables the employee to fully comprehend the information and retain it for sufficient time to enable him or her

to formulate any comment on it.

[28] Although these comments were made in the context of the disclosure of information for the purposes of a re-structuring they are nonetheless applicable to a

situation such as the present case, since the information Peter Monro possessed

8. As described in Philip A Joseph *Constitutional and Administrative Law in New Zealand*, (4th ed, Brookers, Wellington, 2014) at 862.

9. *Vice-Chancellor of Massey University v Wrigley* [2011] NZEmpC 37, [2011] ERNZ 138 at [54]- [55].

related to the decision about the continuation of Mr Higgs' employment, and he should have been provided an opportunity to comment on any information before a decision as to the continuation of his employment was made.

[29] The Authority determined that Peter Monro held information relating to the altercation which was not conveyed to Mr Higgs and that it should have been. That conclusion should be understood in the context which the Authority was required to consider. On this occasion advance notice of a disciplinary meeting had been given with the intention that Mr Higgs would have the opportunity of providing a response at the meeting. This meant that Mr Higgs needed to be appraised of the details before the meeting occurred. The Authority's conclusion should not be understood as meaning that in all cases such information must be conveyed in a letter prior to an investigation meeting. As the dicta in *Wrigley* makes clear, there are a variety of ways in which the duty to disclose might be satisfied. An employer could convey relevant information by way of disclosure to an employee at a relevant meeting and then provide an opportunity for a response, if necessary, by adjourning the meeting to allow the employee to consider his or her position. But that was not the situation which the Authority was required to consider on this occasion. I do not consider the Authority erred on this topic.

[30] The next issue raised by Mr Mackenzie related to the fact that Mr Higgs was not informed as to the bruise caused by the altercation. Mr Mackenzie said that it was not an error to say the information regarding the bruise should have been put to Mr Higgs. He said, however, that the effect of not providing this information amounted to an absence of putting cogent information that made the assertion that there had been an assault even stronger.

[31] However, the evidence of the bruising did not merely make the case against Mr Higgs stronger; it was in fact relevant – as the Authority held – to the question as to which of the two conflicting versions of the altercation should be preferred. The Authority described this fact as being “persuasive as to the degree of force”¹⁰ used,

and ultimately led it to prefer Philip Monro's account when dealing with

¹⁰ *Higgs v Munro*, above n 1, at [76].

contribution. The bruising evidence resolved a conflict; it did not merely endorse a conclusion that was open for other reasons. The Authority did not err in this regard.

[32] Next, it was submitted that the Authority erred in concluding that an aspect of the investigation was flawed because of the failure to interview Matthew Monro. Mr Mackenzie submitted that the Authority's error was to refer to this evidence without making a finding as to whether Peter Monro used this information in reaching his conclusion as to the degree of force used. However, the finding was

that Matthew Monro could also have been expected to be interviewed.¹¹ This is

because following the altercation Mr Higgs drove to a location where Matthew Monro was working. In considering all the circumstances, it was open to the Authority to conclude that Matthew Monro potentially held relevant information. It transpired that he did. It was not incorrect to conclude that this information should have been obtained and conveyed to Mr Higgs; this was yet further information which was relevant to the degree of force used, and relevant to a resolution of the question as to which account from the two protagonists should be preferred. If Peter Monro was in fact aware of this information then it was necessary to disclose it to Mr Higgs.

[33] Next it was submitted that the assertion that Philip Monro should have been interviewed about the throwing of the crowbar and other items with more force than usual because he was angry; and whether Mr Higgs could have thought it was being thrown in his direction. The Authority concluded this was a requirement of a full and fair investigation. This conclusion should be assessed in the context of evidence before the Authority that only a brief note was taken by Peter Monro at the investigation meeting. One of the three topics he recorded was in these terms:

- Comment from [Mr Higgs] – if [Philip Monro] is angry I get angry too –

anger breeds anger.

- “[Philip Monro] started it”

[34] This was an obvious contextual issue, requiring consideration of whether

Mr Higgs had been provoked. What was it that “started it”? It was this issue that the

Authority identified. I do not consider the Authority erred in its finding.

11 *Higgs v Munro Ltd*, above no 1, at [77].

[35] The final aspect of Monro’s cross-challenge relates to the conclusion reached as to possible bias that could have led to some unfairness in the decision-making.

[36] Mr Mackenzie submitted that such allegations are easy to make in a family workplace, and that any employer could have reached the conclusion which was reached by Peter Monro, whether or not there were familial factors.

[37] The Authority regarded this factor as important; it was the first procedural issue which was reviewed. It was based on two key pieces of evidence:

a) The first was that Peter Monro had accepted that it was “probably fair that he felt influenced by others in his decision-making”. Given that concession, it was open to the Authority to reach the conclusion of potential unfairness.

b) Secondly, the Authority concluded that this view was confirmed by the lack of sufficient investigation of the assault. I have reviewed each of those elements and found that the Authority did not err when considering any of them. I consider that it was open to the Authority to regard the fact that the investigation was inadequate in multiple respects which tended to suggest that the decision-maker did not consider the matter with an open mind.

[38] Whilst Mr Mackenzie is correct in his general submission that allegations of this kind are easy to make in a family workplace, it is nonetheless the case that the Authority had ample evidence on which to make its findings in this particular instance.

[39] In summary, I find that the Authority did not err in any of the respects contended for Monro; the cross-challenge is accordingly dismissed.

Remedies

[40] As described earlier, the two findings requiring consideration relate to \$4,000 distress compensation award under [s 123\(1\)\(c\)\(ii\)](#) of the Act, and the finding that contribution should be fixed at 50 per cent under [s 124](#) of the Act.

[41] The essence of the submissions made by Mr McDonald for Mr Higgs on this aspect of his challenge was to emphasise that compensation should be real and adequate otherwise an award could increase the hurt and humiliation suffered. Mr McDonald said that the Court must look at the actual hurt suffered in each case and compensate accordingly. It was submitted that an award of \$4,000 “sits at the very bottom of awards” given by the Authority and the Court; and that “such an award is below the national average for compensation”.

[42] In the course of his oral submissions, Mr McDonald referred to *Telecom New Zealand Limited v Nutter*,¹² where the Court of Appeal considered on the facts of that case that an award of \$10,000 seemed “meagre” given the humiliating circumstances of the employee’s dismissal and other factors; to *Murphy v Steel & Tube New Zealand Limited*,¹³ where it was held the employee has suffered significant distress as a result of dismissal so that an award of \$4,000 was justified; and to *Dalley v Norrell Building Limited*¹⁴ where the distress suffered by an employee following dismissal consisted of humiliation, having to contact prospective employers looking for work, consequences of sleeplessness and worry about finances as well as emotional distress which it was held justified an award of \$6,000.

[43] I have to consider whether the amount awarded in this case is within the permissible range of awards which could have been given, having regard to the consequences suffered by Mr Higgs.

[44] In *Robinson v Pacific Seals New Zealand Limited*, Judge Inglis stated:¹⁵

¹² *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA) at [93].

¹³ *Murphy v Steel & Tube New Zealand Ltd*, (2007) 4 NZELR 719, Judge Couch (EmpC) at [111].

¹⁴ *Dalley v Norrell Building Ltd*, [2013] NZEmpC 4 at [41].

¹⁵ *Robinson v Pacific Seals New Zealand Ltd* [2014] NZEmpC 99 at [54], (footnotes omitted).

It appears that \$5,000 by way of a compensatory award in the Authority is relatively standard. While there are instances in which awards of more than

\$5,000 have been awarded there are, unsurprisingly, cases which have attracted less. Although it is relevant to have regard to the sort of awards

made in analogous cases, the exercise cannot be applied rigidly. Each case must ultimately be assessed on its merits and in light of its facts.

[45] The amount fixed by the Authority was only \$500 less than the sum which was awarded in *Murphy* which was \$4,000 and \$1,000 less than the sum described in *Robinson* as standard which was \$5,000.

[46] Turning to the actual findings, the Authority accepted there was some financial difficulty for Mr Higgs arising from the dismissal, although he was able to obtain some casual work and then permanent employment which mitigated that to a degree. He had accepted that he was able to buy a car a few weeks after termination. The Authority said that Mr Higgs had felt embarrassed by the termination and that he considered that the dismissal had been unfair. These findings were open to the Authority having regard to the evidence given by Mr Higgs, as contained in the witness statement he submitted to the Authority.

[47] Having regard to the dicta which I have reviewed, I do not consider an award of \$4,000 to be outside the permissible range of sums which could have been awarded on these facts. I accordingly, dismiss this aspect of Mr Higgs' challenge.

Issue as to contribution

[48] Mr McDonald submitted that the findings made by the Authority that remedies should be reduced by 50 per cent was incorrect. The submission did not put in issue the factual findings made by the Authority when considering the issue of contribution. Rather, it focused on the extent of the contribution finding, it being emphasised that 50 per cent was excessive.

[49] [Section 124](#) of the Act provides:

124 Remedy reduced if contributing behaviour by employee

Where the Authority or the court determines that an employee has a personal grievance, the Authority or the court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance—

d. consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and

e. if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[50] In *Paykel Limited v Ahlfeld*, Judge Travis held with regard to the comparable provisions of the [Employment Contracts Act 1991](#) that the following steps are required when considering contribution:16

a) The first question is whether the employee has a personal grievance.

b) Secondly, it is necessary to consider the extent, if any, to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; in doing so, there must be regard to questions of causation so as to determine the extent to which the employee's actions contributed to the situation which in turn gave rise to the dismissal.

c) If there is a finding that there is a causal connection between the actions and the situation giving rise to the dismissal, then the third step requires consideration of the culpability or blameworthiness of the employee.

[51] This sequential approach continues to be relevant. Also of assistance is the dicta of Chief Judge Colgan in *Harris v The Warehouse Limited* as to the exercise of the discretion which arises under s 124 of the Act, which he put in this way:17

[179] Finally, in this process of consideration of s 124(a), the Authority or the Court is required to "consider the extent" to which those employee actions contributed to the situation that gave rise to the grievance. That connotes a proportionate analysis reflecting the commonsense experience that, on many occasions, an employee will have been at fault but the circumstances did not justify that employee's dismissal or disadvantage. There are, also, many cases in which the Court will find that there is no element of (culpable) contributory conduct by an employee, in which case neither the nature nor the extent of the remedies to be provided will need to be reduced.

[180] Next, the Authority and the Court are left with a broad discretion even if they find that the actions of the employee contributed towards the situation

16 *Paykel Ltd v Ahlfeld* [1993] 1 ERNZ 334 (EmpC), at 337-338; see also *Lavery v Wellington Area*

that gave rise to the grievance. That is because of the opening words of s

124(b) (“if those actions so require”). In each case, therefore, even if there

were blameworthy or culpable actions or omissions of the employee that contributed to the situation that gave rise to the grievance, it will still be necessary for the Court or the Authority to consider whether those will “require” a reduction of the remedies.

[52] Many cases have in the past emphasised that the two essential points to consider are causation and proportionality.¹⁸

[53] In the present case the challenge does not relate to the question of whether Mr Higgs’ actions during the altercation contributed towards the situation that gave rise to his personal grievance. Rather, the question is whether those actions require a reduction of the remedies that would otherwise have been awarded, which is an issue of proportionality.

[54] Mr McDonald developed his submissions by relying on the following judgments which considered contribution issues:

a) First, he referred to *Donaldson & Youngman (t/a Law Courts Hotel) v Dickson*.¹⁹ There Chief Judge Goddard held that a finding in the order of 50 per cent or even greater should be very rare, referring to the earlier decision of *Paykel Limited v Morton*²⁰ where a reduction of

25 per cent was regarded as “one of particular significance”.

b) Next, reference was made to *Murphy*²¹ where there was a contribution finding of 20 per cent. An employee threw out his hand in a defensive and instinctive reaction because he believed he was being attacked. The back of the employee’s hand struck the face of the co-worker who was threatening him, causing cuts to his lip and the inside of his mouth. The co-worker’s head went back and he fell to the floor, for reasons which could not be determined. There was also an incident between the same employees where the Court was unable to resolve conflicts as to

precisely what had happened when the employee dropped a pair of

¹⁸ For example *MacAdam v Port Nelson Ltd (No 2)* [1993] NZEmpC 38; [1993] 1 ERNZ 300 (EmpC).

¹⁹ *Donaldson & Youngman t/a Law Courts Hotel v Dickson* [1994] 1 ERNZ 920 (EmpC) at 929.

²⁰ *Paykel Ltd v Morton* [1994] 1 ERNZ 875 (EmpC) at 886.

²¹ *Murphy v Steel & Tube New Zealand Ltd*, above n 13 at [92].

bolt-cutters at the feet of his co-worker in a manner which the co-worker believed was threatening. This was in the context of a short but robust exchange between the two. The Court concluded there was misconduct on the part of both. In all the circumstances the Court concluded that the extent to which Mr Murphy contributed to the situation giving rise to his dismissal was modest, and assessed it at

20 per cent.

c) The third case relied on by Mr McDonald was *Dalley*,²² where an employee was involved in a loud and abusive exchange with a co-worker. Ultimately the employee pushed the co-worker away and stepped back, losing his balance briefly but not falling over. After the co-worker took off his tool-belt and advanced towards Mr Dalley, he took off his own tool-belt and adopted a fighting stance. A third party intervened with the result that both employees returned to work. The Court found that although the co-worker was the instigator of an argument and should bear most of the responsibility for what occurred by responding, Mr Dalley needlessly escalated an argument which was inappropriate since he was a Foreman who had a particular duty to

control his behaviour.²³ Overall, Mr Dalley’s contribution to the

established unjustifiable dismissal was one-third.

[55] Mr McDonald submitted that with reference to the foregoing decisions, a contribution finding of 50 per cent was at the “higher end” of the range for an assault. In response, Mr Mackenzie submitted that such a conclusion was well within the appropriate range.

[56] There are other decisions of this Court to which reference should be made when considering this issue. In *Howard v Carter Holt Harvey Packaging Limited*,²⁴ an employee threw a punch at a co-worker’s head because he believed a rubber-band had been deliberately fired at him by the co-worker. The Court was satisfied that

there were significant consequences arising from significant procedural defects in a

22 *Dalley v Norrell Building Ltd*, above n 14, at [42]-[48].

23 At [45].

24 *Howard v Carter Holt Harvey Packaging Ltd* [2014] NZEmpC 157.

disciplinary process which resulted in his dismissal which justified an award of

\$10,000 for humiliation, loss of dignity and injury to feelings. An award for the throwing of the punch in a context where it was found the employee should have known that assaulting other workers in the workplace was not tolerated, justified a significant contribution finding of 70 per cent.

[57] Mr McDonald submitted that a punch to the head was plainly more serious than the nature of the assault which was found to have occurred in the present case, so that *Howard* was distinguishable. I agree that the assault in that case was more serious than the incident which occurred in this case; that means that a finding of

70 per cent contribution would have been excessive.

[58] In the present case, the Authority summarised Mr Higgs' account as to what had occurred, and then determined that Philip Monro's account was more probable, since it was supported by the physical examination of his sternum two days after the incident which confirmed bruising. Whilst it was recognised the investigation had been insufficient, the Authority was satisfied that Mr Higgs had assaulted Philip Monro not simply in a technical manner but by way of an angry reaction which was quite inappropriate in the workplace.

[59] The uncertainty arising from the inadequate investigation which was relevant to this issue was whether Philip Monro threw the crowbar and other items with more force than usual because he was angry, and whether these items were thrown in the direction of Mr Higgs. The Authority took this uncertainty into account, apparently in favour of Mr Higgs, when determining the extent of the reduction for fault.

[60] I am satisfied that the factual findings which the Authority made were open to it on the evidence it received.

[61] Although as long ago as 1994, the former Chief Judge considered that a contribution finding in the order of 50 per cent or more would be very rare. However, particular factual circumstances may require a significant finding.

Decisions to this effect are now no longer rare.²⁵ The Court has not infrequently

25 *Booth v Big Kahuna* [2014] NZEmpC 134, [2014] ERNZ 295 at [96].

considered that contributions to the situation that gave rise to the personal grievance has been so significant that a finding at 50 per cent is justified.²⁶ There are yet other instances where even higher awards have been made;²⁷ and in some cases findings have been made at 100 per cent, although that is an outcome which in my view will indeed be rare.²⁸

[62] Turning to situations involving angry reactions, in *Murphy* and *Dalley* assessments were made which were significantly less than 50 per cent (20 per cent and 33 per cent respectively); but there are other such cases where 50 per cent has been considered appropriate, even if they did not involve an assault: *Argle*²⁹ and

Panovski.³⁰ Also relevant is the decision of *Howard* involving a dangerous punch to

the head and a significant finding of 70 per cent contribution.

[63] All such cases are of course fact specific. I consider that a finding of

50 per cent is indeed, as Mr McDonald put it, at the top end of the range for this particular case, but it is by a fine margin within the confines of the range.

[64] I accordingly conclude that the challenge with regard to this aspect of the

Authority's determination must also be dismissed.

Disposition

[65] I have concluded that the Authority did not err on any of the liability or remedy findings which I have been required to review. The challenge and cross-challenge must be dismissed.

[66] That being the case, the Court is not required to carry on to the second stage of the non de novo challenge by reassessing the matters in dispute on the basis of

evidence placed before the Court.

26 *Groundworks Ltd v Ford* WC10/03, 1 April 2003 (EmpC); *Willis v Fonterra Cooperative Group Ltd* [2010] NZEmpC 80, (2010) 7 NZELR 630 at [88]; *Radius Residential Care Ltd v McLeay* [2010] NZEmpC 149, [2010] ERNZ 371 at [58] and *Nisha v LSG* [2015] NZEmpC 171 at [24].

27 *Richardson v Board of Governors of Wesley College* AC20/03, 19 March 2003 (EmpC) at [29] where it was fixed at 75 per cent, *Dumolo v Lakes District Health Board* [2014] NZEmpC 40 at [41] where an award under s 123(1)(c) of \$12,000 reduced to \$3,000.

28 See discussion in *Knapp v Loctite Aluminium Specialities Ltd* [2015] NZEmpC 71.

29 *Argyle Fabrics v Tetapo* CEC5/98, 3 February 1998 (EmpC) at 9.

30 *Panovski v Marine Trimmers* (2008) 5 NZELR 739 (EmpC) at [39].

[67] I reserve costs. My provisional view is that since neither party succeeded, each party should bear their own costs. If, however, an application is necessary it should be supported appropriately by evidence and submissions which should be filed within 21 days, with an appropriate response by the other party within 21 days

thereafter.

Judgment signed at 12.30 pm on 17 November 2015

B A Corkill

Judge

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